20363 SERVICE DATE - SEPTEMBER 22, 1997
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SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41552

MADIX, INC. dba MADIX STORE FIXTURES, THE NUTRASWEET COMPANY, PRICE SAVERS, formerly a division of THE KROGER CO., REVLON, INC., ROBINSON NUGENT, INC., RPM-MERIT, INC., SUNBURY TEXTILE MILLS, INC., AND SUPERIOR INDUSTRIES INTERNATIONAL, INC.--PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF TRANSCON LINES

Decided: September 16, 1997

This proceeding arises out of the efforts of the trustee in bankruptcy of Transcon Lines (Transcon or respondent), a former motor carrier, to collect undercharges based on common carrier tariffs for certain transportation services performed between 1987 and 1990 by Transcon for Madix, Inc. dba Madix Store Fixtures (Madix), The Nutrasweet Company (Nutrasweet), Price Savers, formerly a division of The Kroger Co. (Price Savers), Revlon, Inc. (Revlon), Robinson Nugent, Inc. (Robinson), RPM-Merit, Inc. (RPM-Merit), Sunbury Textile Mills, Inc. (Sunbury), and Superior Industries International, Inc. (Superior). We find that collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Accordingly, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter is before the Board on referral from the United States Bankruptcy Court, Central District of California, in *Leonard L. Gumport, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines v. Madix, Inc. dba Madix Store Fixtures, The Nutrasweet Company, Price Savers, formerly a division of The Kroger Co., Revlon, Inc., Robinson Nugent, Inc., RPM-Merit, Inc., Sunbury Textile Mills, Inc., Superior Industries International, Inc.*, Case No. SB-93-22207-DN, Chapter 7, Adv. No. SB-94-01435-DN; Adv. No. SB-94-01838-DN; Adv. No. SB-94-01180-DN, Adv. No. SB-94-01616-DN; Adv. No. SB-94 01854-DN; Adv. No. SB-93-02413-DN, Adv. No. SB-94-01866-DN; and Adv. No. SB-93-02919-DN, (referral orders dated February 1, 1995).[2] The court stayed the proceedings to enable referral of issues of tariff applicability, rate reasonableness and unreasonable practice to the ICC for determination.

Pursuant to the court orders, petitioners, on March 23, 1995, filed a petition for declaratory order requesting the ICC to resolve the issues referred to by the court. By decision served April 6, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to proceedings that were pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] The referral orders for the Price Savers and Revlon proceedings were dated January 18, 1995, and February 22, 1995, respectively.

reasonableness issues. On June 5, 1995, petitioners filed their opening statements. Respondent filed its reply on July 3, 1995. Petitioners filed their rebuttal on July 25, 1995.[3]

Petitioners assert that Transcon's efforts to collect undercharges for shipments transported by Transcon during 1987-1990 constitute an unreasonable practice under section 2(e) of the NRA. Petitioners maintain that written evidence submitted by Madix, Nutrasweet, and Price Savers shows that each petitioner, in tendering its traffic to Transcon, relied upon a transportation rate offered by Transcon; that the offered rates were billed and collected; and, that Transcon accepted payment by petitioners of these rates as payment in full.

Respondent's statement consists of legal argument of counsel. Respondent maintains that petitioners have not proffered written proof that the rates negotiated had been agreed upon, i.e., written evidence of the original rate charged or that petitioners reasonably relied on this rate. Respondent also contends that section 2(e) of the NRA does not apply retroactively to pending claims such as those that are the subject of this proceeding.[4]

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[5]

It is undisputed that Transcon no longer transports property.[6] Therefore, we may proceed to determine whether the respondent's attempt to collect undercharges (the difference between the applicable tariff rate and the rate originally collected) is an unreasonable practice.

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[3] By decision served August 30, 1995, petitioners Sunbury and Superior, at their request, were dismissed as parties to this proceeding. By decision served February 5, 1996, petitioner Robinson, at its request, was dismissed from this proceeding. By decision served February 29, 1996, petitioners Revlon and RPM-Merit, at their request, were dismissed as parties to this proceeding. As a consequence, only Madix, Nutrasweet, and Price Savers remain as petitioners in this proceeding.

[4] With respect to the retroactive applicability of section 2(e), we point out that the courts have consistently held that section 2(e) by its own terms, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. *See, e.g., Gold v. A.J. Hollander* Co. (In re Maislin Indus.), 176 B.R. at 443-44 (Bankr. E.D. Mich. 1995); *Jones Truck Lines, Inc. v. Scott Fetzer Co.*, 860 F. Supp. 1370, 1375-76 (E.D. Ark. 1994); *North Penn Transfer, Inc. v. Stationers Distributing Co*, 174 B.R. 263 (N.D. Ill. 1994); *Allen v. National Enquirer*, 187 B.R. 29, 33 (Bankr. N.D. Ga. 1995); *cf. Jones Truck Lines, Inc. v. Phoenix Products Co.*, 860 F. Supp. 1360 (W.D. Wisc. 1994).

[5] Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

[6] Transcon held both motor common and contract carrier operating authority, issued by the ICC under various sub-numbers of No. MC-110325. All of Transcon's operating authorities were revoked on September 21, 1990.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

In *E.A. Miller, Inc.--Rates and Practices of Best,* 10 I.C.C.2d 235 (1994) (*E.A. Miller*), the ICC held that the original freight bills embodying the negotiated rate meet the "written evidence" standard of section 2(e). In *William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp.*, C.A. No. H-89-2379 (S.D. Tex. March 31, 1997), the court found that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rates and that the rates were agreed upon by the parties.

Wynell Morton, Comptroller of Madix,[7] a manufacturer of store fixtures and display equipment located in Terrell, TX, states that he is generally familiar with the business operations of his company, particularly with respect to the movement of Madix products via Transcon during the 1987-90 period. Mr. Morton has testified that Transcon offered his company discounted freight rates on which Madix relied in tendering its traffic to Transcon; that the quoted rates were billed to and paid by Madix; and that the Madix payments were accepted by Transcon without objection.

Attached to the declaration submitted by Mr. Morton is a copy of Transcon tariff ICC TCON 625, Item 1000-1898, effective June 10, 1987, which calls for a 30% discount on outbound movements from Terrell, and tariff ICC TCON 103-A, Item 610, effective June 6, 1988, which establishes a $41.50 minimum charge per shipment. Also attached are six representative corrected freight bills containing original freight bill data issued by Transcon to Madix for outbound shipments from Terrell between June 2, 1987, and March 9, 1989. An examination of the corrected freight bills indicates that a 30% or 45% discount had been applied to the originally assessed charges in five of the freight bills (30% applied in four freight bills and 45% in one freight bill), and that a $43.48 charge was originally assessed in the sixth freight bill. Respondent’s modifications resulted in the elimination of the original discount applied in four of the freight bills, the rerating of the originally assessed charges in the one freight bill in which the originally applied discount was retained, and the imposition of a $74.35 minimum charge for the originally assessed $43.48 shipment.

Bruce D. Hocum, a rate auditor retained by Nutrasweet to review Transcon’s balance due bills, states that the subject shipments consisted primarily of less-than-truckload ("LTL") movements of sweetening compounds and related commodities transported between Park Forest, IL, and points in the United States. Mr. Hocum asserts that Transcon’s original freight billings provided Nutrasweet with a 35% discount from class rates. According to Mr. Hocum, Transcon’s corrected freight bills eliminated the originally applied discounts.

Attached as Exhibit A4 to the opening statement of petitioners are eight representative revised freight bills provided to Nutrasweet by Transcon containing original freight bill data issued for shipments moving to or from Park Forest and University Park, IL, between June 29, 1987, and June 14, 1989. An examination of the revised freight bills indicates that a 35% discount had been applied to the original charges assessed in six of the freight bills and that the remaining two freight bills were originally assessed charges of $35.00 and $43.48, respectively. Respondent’s modifications eliminated the original discount applied in six of the freight bills and imposed minimum charges that exceeded the $35.00 and $43.48 charges originally assessed.

Ronald A. Beagle, corporate transportation manager of The Kroger Co., a food manufacturer and retailer, indicates that Price Savers was a division of Kroger during the 1987-1990 period when the subject shipments were transported. He states that he is generally familiar with the business operations of his company, including the transportation of company products via

[7] Mr. Morton has been employed by Madix since 1967.

Transcon. According to Mr. Beagle, Transcon delivered freight "collect" to Price Savers from various vendors and billed Price Savers at a discount rate agreed to by Transcon and the vendors; the bills were promptly paid by Price Savers and accepted by Transcon without objection; and Price Savers relied upon the discount rate reflected in the originally issued “collect” freight bills and continued to agree with its vendors’ use of Transcon’s services. Mr. Beagle states that, had Price Savers been aware that Transcon interests would later attempt to claim higher, undiscounted rates, rather than the discounted amounts originally agreed to and billed by Transcon, petitioner would have advised its vendors to use other trucking companies whose rates compared favorably to Transcon's discount rates, rather than using Transcon.

Attached to the declaration submitted by Mr. Beagle are five representative, revised freight bills containing original freight bill data issued by Transcon to Price Savers for shipments transported between September 23, 1987, and May 4, 1989. An examination of the revised freight bills indicates the application of a 49% or 61% discount in each of the originally issued freight bills (49% applied in one freight bill and 61% in four freight bills). Respondent’s modifications resulted in the elimination of the original discount applied in four of the freight bills and the rerating of the originally assessed charges in the one freight bill in which the originally applied discount was retained.

In this proceeding, the evidence indicates that petitioners conducted business with Transcon in accordance with agreed-to negotiated rates. We find that the representative, revised freight bills,[8] which embody the originally assessed charges submitted on behalf of each petitioner; the contemporaneous tariff documents submitted on behalf of Madix; and the unchallenged testimony of Mr. Morton, Mr. Hocum, and Mr. Beagle satisfy the written evidence requirement of section 2(e) and reflect the existence of negotiated rate agreements between petitioners and Transcon.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here the evidence establishes that a negotiated rate was offered by Transcon to each petitioner; that each petitioner tendered freight to Transcon in reliance on the negotiated rate; that the rates negotiated were billed and collected by Transcon; and that Transcon now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Transcon to attempt to collect undercharges from Madix, Nutrasweet, and Price Savers for transporting the shipments at issue in this proceeding.[9]

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[8] Some of the representative freight bills involve shipments at issue in which the originally granted discount has been disallowed for failure to pay the billed charge within 90 days. Respondent concedes that, in light of the Supreme Court's decision in *ICC v. Transcon Lines*, 115 S. Ct. 689 (1995), those of its undercharge claims predicated on the late payment provision of its tariff are invalid. To the extent that any of its revised freight bills are based *solely* on such late payment claims, respondent agrees that they should be stricken from this proceeding.

[9] Although the record here does not contain all of the freight bills for which respondent seeks undercharges, it does contain sample freight bills, which appear to be representative of all of Transcon's undercharge claims. These freight bills constitute written evidence of a negotiated rate as to the specific shipments identified in the freight bills. The record also contains the uncontroverted testimony of petitioners as to their reliance on the originally negotiated rate. Transcon's general assertion that petitioners have not provided written evidence of the rate originally charged or of the shippers' reliance on that rate clearly fails as to those shipments identified in the freight bills.

(continued...)

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on its service date.

3. A copy of this decision will be mailed to:

The Honorable David N. Naugle
United States Bankruptcy Court,
Central District of California
200 Federal Building
699 North Arrowhead Avenue
San Bernardino, CA 92401

Re: Case No. SB 93-22207 DN, Chapter 7
Adv. No. SB 94-01435 DN
Adv. No. SB 94-01838 DN
Adv. No. SB 94-01180 DN

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

(...continued)

As to any other shipments with respect to which specific freight bills were not submitted, where the documentation is similar to that presented in the sample freight bills, it would be an unreasonable practice for Transcon "to attempt to recover the difference between the applicable tariff rate . . . and the negotiated rate." Accordingly, we advise the court of our legal opinion that, to the extent other Transcon undercharge claims follow the pattern outlined here, they too would constitute an unreasonable practice.